Lim Chong Construction Co Sdn Bhd v Silam Quarry Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CODE D4-22-364-89
ZAKARIA YATIM J
18 APRIL 1990

Civil Procedure — Writ — Striking out — Writ not served on defendant — Statement of claim served subsequent to defendant's application to set aside writ — Whether statement of claim can be relied on to resist application to set aside writ

Civil Procedure — Writ — General indorsement — Whether general indorsement must disclose cause of action — Failure to do so — Whether writ still valid

Civil Procedure — Injunction — Setting aside — General indorsement not disclosing a reasonable cause of action — No serious question to be tried

The plaintiff filed a writ of summons with only a general indorsement and then proceeded to obtain an interlocutory injunction against the defendant. The writ was never served and the defendant applied to set aside the injunction and strike out the writ and indorsement. Following this application the plaintiff filed their statement of claim.

Held, allowing the defendant's application:

(1) It is essential that the plaintiff must serve the writ on the defendant. As the writ had not been served, no appearance could be entered and the plaintiff was therefore precluded from serving the statement of claim on the defendant. The statement of claim could not therefore be considered for the purposes of this application.

(2) The indorsement must disclose a cause of action. However, a failure to do so does not render a writ a nullity. The plaintiff could still serve the writ on the defendant and deliver the statement of claim. As such this was not a proper case to strike out the indorsement or writ.

(3) One of the essential requirements for granting an interlocutory injunction is that the court must be satisfied that there is a serious question to be tried and the grant of an injunction depends on whether there is a cause of action. Since the indorsement in the present writ does not disclose any reasonable cause of action, there is no serious question to be tried. The interlocutory injunction was therefore ordered to be set aside.

Cases referred to

1 *Utusan Melayu (Malaysia) Bhd & Anor* v *Chan Tse Yuen* [1989] 1 MLJ 185 (refd)
2 *Hartecon JV Sdn Bhd* v *Perwira Habib Bank Bhd* [1988] 1 CLJ 606 (refd)
3 *Sterman* v *EW & WJ Moore* [1970] 1 QB 596 (folld)
4 *Pontin & Anor* v *Wood* [1962] 1 QB 594 (refd)
5 *American Cyanamid Co* v *Ethicon Ltd* [1975] 1 All ER 504 (folld)
6 *Cayne* v *Global Natural Resources* [1984] 1 All ER 225 (folld)
7 *Siskina* v *Distos Compania Naviera SA* [1979] AC 210 (folld)

Legislation referred to

Rules of the High Court 1980 O 18, O 6

PH Lee for the plaintiffs.
Julian Ding for the defendants.

Cur Adv Vult

Zakaria Yatim J: This is an application by the defendant for an order of the court that: (1) the injunction granted ex parte against the defendant on 22 February 1989 be set aside; (2) the plaintiff's general indorsement and writ be struck out as disclosing no reasonable cause of action against the defendant; (3) damages suffered by the defendant as a result of the injunction be assessed; and (4) the costs of the application be paid by the plaintiff to the defendant.

At the hearing of the application, Mr Julian Ding, counsel for the defendant, proposed to deal with prayer 2 first, that is, to strike out the plaintiff's general indorsement and writ on the ground that the general indorsement did not disclose any reasonable cause of action against the defendant.

The plaintiff filed the writ with the general indorsement on 21 February 1989. On the same date, the ex parte application for injunction together with an affidavit in support of the application was filed. The application was heard on 22 February 1989 on a certificate of urgency and the injunction was granted on the same day. The present application was filed on 20 April 1989. The plaintiff filed their statement of claim only on 27 June 1989, more than two months after the present application was filed.

Mr PH Lee, counsel for the plaintiff, in his submission referred to the statement of claim. Mr Ding, however, contended that without the leave of the court, the statement of claim could not be considered for the purpose of the present application. According to him, the writ was never served on the defendant. He added that since the writ was not served on the defendant, no appearance was entered. Mr Lee submitted that the writ was served on the defendant on 27 June 1989 together with the statement of claim. Mr Ding denied this and Mr Lee subsequently admitted that the writ had not been served on the defendant.

Under O 18 r 1 of the Rules of the High Court 1980, it is essential that the plaintiff must serve the writ on the defendant. If the statement of claim is not indorsed on the writ, as in this case, it must be served on the defendant at any time after service of the writ but before the expiration of 14 days after the defendant has entered appearance. In the present case, since the writ was not served on the defendant there was therefore no appearance entered, and the plaintiff cannot serve the statement of claim on the defendant until the writ is served and appearance entered. The plaintiff has not asked the court to grant leave to use the statement of claim without complying with O 18 r 1. In the circumstances, the statement of claim cannot be relied upon for the purpose of the present application.

The court therefore has to examine the general indorsement in the writ to see whether it discloses any reasonable cause of action against the defendant. The general indorsement is reproduced below:

General Indorsement

1 An interim/interlocutory injunction to restrain the defendant whether by itself, its servants or agents or otherwise whosoever from threatening and/or putting into effect such threat or threats to claim on the banker guarantee No L/G KL 88/818 dated 16 August 1988 for the sum of $150,000 given by the plaintiff to the defendant the said banker guarantee being issued by Southern Bank Bhd, Kuala Lumpur pending the disposal of the suit herein.

2 An order that the defendant whether by itself, its servants or agents or otherwise do forthwith withdraw the letter dated 23 January 1989 to the bank demanding payment on the said guarantee.

3 An order that the defendant do forthwith furnish the plaintiff with a true and correct account commencing from 17 August 1988 to 23 January 1989 for the plaintiff's verification.

4 Further or other relief as may be just.

5 Costs.

It will be noted that in the general indorsement the plaintiff is merely seeking an injunctive relief as a final relief. The plaintiff has not identified any 'legal right sufficient to give rise to a justiciable cause of action ...'. (*Utusan Melayu (Malaysia) Bhd & Anor* v *Chan Tse Yuen.*[1]) The plaintiff has also not shown a factual situation the existence of which entitles them to obtain a remedy against the defendant. (*Hartecon JV Sdn Bhd* v *Perwira Habib Bank Bhd*[2] at p 608.) Indeed, there is no mention of the nature of the plaintiff's claim against the defendant. In my opinion, the plaintiff has not disclosed any reasonable cause of action against the defendant.

The question that arises here is whether it is necessary that the general indorsement in the writ should disclose a cause of action. Order 6 r 2(1)(a) states:

Before a writ is issued it must be indorsed —

(a) with a statement of claim or, if the statement of claim is not indorsed on the writ, with a concise statement of the nature of the claim made or the relief or remedy required in the action begun thereby.

The above rule is identical with the rule in the English RSC. In *Sterman* v *EW & WJ Moore*[3] at p 603, Lord Denning MR said:

> The first question is whether the indorsement on the writ was defective or not. Order 6 r 2(1) says that the writ must be indorsed 'with a concise statement of the nature of the claim made or the relief or remedy required in the action begun thereby.'
>
> The old rule was in the same terms. But the old rules contained forms which showed that the indorsement had to state the cause of action, for example, damages for negligence or breach of duty. The new rules do not contain the forms; but I am inclined to think that it is still necessary to state the cause of action. The indorsement should state the nature of the claim made and the relief or remedy required. The word 'or' should be read as 'and'. At any rate, even if it is not necessary to state the cause of action, it is very desirable to do so.

Lord Denning went on to state that the writ did not comply with the rule. He found the writ defective. But he said, 'That defect did not render the writ a nullity. It was at most an irregularity ...'. Mr Lee submitted that in the instant case the writ was only an irregularity. I agree. In my view, the plaintiff can still serve the writ on the defendant and deliver the statement of claim as specified in the rules. Therefore, this is not a proper case to strike out or set aside the general endorsement and the writ. See also *Pontin & Anor* v *Wood.*[4]

Since the general indorsement does not disclose any reasonable cause of action, there is therefore no serious question to be tried. One of the essential requirements for granting an interlocutory injunction, as laid down in *American Cyanamid Co* v *Ethicon Ltd*[5] at p 510, is that the court must be satisfied that there is a serious question to be tried. Lord Diplock in his speech in the *American Cyanamid* case[5] envisaged a trial of the action. In *Cayne* v *Global Natural Resources*,[6] May LJ said at p 237:

> ... in the *Cyanamid* case [1975] 1 All ER 504 there was a serious question to be tried between the parties, which could only be resolved by a trial. It was clearly contemplated that there would be a trial. The application for the interlocutory injunction was merely a holding operation pending that trial ...

Since a trial is envisaged the plaintiff must show that he has a cause of action. The grant or refusal of an interlocutory injunction therefore depends on whether there is a cause of action. In *Siskina* v *Distos Compania Naviera SA*,[7] Lord Diplock, in his speech at p 256 said:

> A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles, which may or may not include a final injunction.

In the present case, since there is no cause of action, there is no serious question to be tried. In the circumstances, I order that the injunction granted ex parte on 22 February 1989 be set aside. I also order that damages be assessed by the senior assistant registrar, by virtue of the granting of the said injunction. Finally, the plaintiff will pay the costs of this application to the defendant which is to be taxed.

Application allowed.

Solicitors: *Shearn Delamore & Co; Steven Ti & Lee.*

Reported by *Mathavan Devadas*